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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.

JOHN WALLACE,

Petitioner

vs.

A. B. FOSTER, Sheriff of Fulton County, Georgia

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF GEORGIA TO REVIEW A DECISION OF SAID COURT.

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

John Wallace, a citizen of the United States and of the State of Georgia, brings this petition for the writ of certiorari to be directed to the Supreme Court of the State of Georgia for the purpose of obtaining in this Honorable Court a review and, if comformable to law, a reversal of a decision of the Supreme Court of the State of Georgia, entered finally on the 15th day of March, 1950, (R 98) in the case of John Wallace, Plaintiff in Error, vs. A. B. Foster, Sheriff, Defendant in Error, docketed in said court as case Number 16924.

The Supreme Court of Georgia has appellate jurisdiction in such cases and is the highest court of the State of Georgia in which a decision in this case could be had.

PART I.

SUMMARY OF MATTER INVOLVED.

1.

On the 16th day of September, 1949, petitioner filed in the Superior Court of Fulton County, Georgia, his petition for the writ of habeas corpus, (R 1) and the same was sanctioned and directed to the Hon. A. B. Foster, Sheriff of said County, the respondent, and made returnable on the 24th day of September, 1949. On the hearing the trial court entered an order denying the writ (R 13).

2.

Petitioner here contends that the conduct of the trial in the state court in which petitioner was convicted, and the methods employed by officers of the state and of the county of Coweta (where the trial was had) to obtain a conviction deprived him of his life and his liberty without due process of law, and in violation of his rights under the 14th Amendment to the Constitution of the United States, which reads, in part:

> ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws"

for that

(i) The said officers procured the false testimony of two accomplices, upon which testimony conviction was had, by inducing them by promises and grant of immunity from prosecution to waive their constitutional right to refuse to

testify to matters tending to criminate themselves and to testify falsely against petitioner;

(ii) The said officers suppressed the testimony of two accomplices whose testimony would have acquitted petitioner (if accepted by the jury) by inducing them, by promise and grant of mitigated sentence, to claim their constitutional right to refuse to testify to matters tending to criminate themselves, and thus suppressed testimony favorable to petitioner;

(iii) The active participation in the trial of the case by the prosecutor, namely: A. Lamar Potts as Sheriff, after having posted and paid out of his personal funds $500.00, for information against petitioner, by drawing the grand jury which returned the indictment; by drawing of the traverse jury which tried the case, serving the summons on each of the jurors composing said grand and traverse juries; by attending the said juries and having their custody as they performed their several functions in connection with petitioner's indictment, trial and conviction; and by otherwise functioning as an official of the court which tried and convicted petitioner, thereby performing the dual role of prosecutor and court official;

(iv) The said prosecutor-sheriff held the only witnesses having knowledge of the facts pertinent to petitioner's defense incommunicado and refused to permit either petitioner or his counsel or his friends from communicating with them, although prosecutor and the State's counsel had unlimited opportunity to consult with them, and thus prevented any factual development of petitioner's defense;

3.

Petitioner here contends that he was denied the right to a speedy and public trial by an impartial jury free from influence such as is contemplated by the 6th Amendment to the Constitution of the United States, and was denied the right to be confronted with the witnesses against him,

in violation of his rights under the 6th Amendment to the Constitution of the United States, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

for that:

(i) The active efforts of two cosmopolitan newspapers having general circulation in the county wherein petitioner was compelled to stand trial, and general circulation throughout the State of Georgia, to prejudice each prospective juror against petitioner by utterly false news stories, editorials, magazine articles, and radio broadcasts which robbed petitioner of a fair and impartial trial; and by threatening editorials directed to the Board of Pardons and Paroles of the State of Georgia while petitioner's case was pending before such board, in an effort to intimidate and control the judgment of its several members, which news stories and editorials did rob petitioner of the uninfluenced judgment of members of said Board, petitioner being without any means or opportunity whatever to answer any of such editorials or news stories or magazine articles, or radio broadcasts.

4.

The Supreme Court of Georgia ignored the federal rules applicable in the case; ignored the federal questions presented, and applied rules governing procedure applicable only in cases based upon rights arising under statutory laws of the State. The basic questions were left untouched, but the practical effect of the decision was to decide the questions in a way probably not in accord with applicable decisions of this court.

PART II.

STATEMENT OF BASIS OF JURISDICTION

Petitioner states that this Court has jurisdiction to review the decision complained of by reason of authority granted in U. S. C. A. Title 28, Sec. 1257 (3) and Rule 38½ of this Court:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * *"

Petitioner contends that the Supreme Court of the United States has jurisdiction to entertain and sanction this petition for certiorari, and to grant the relief sought by petitioner because substantial federal questions are present and presented in the case, as follows:

(a) Whether the conduct of his trial in the State court, and the methods there employed to bring about his conviction and sentence to death, as specifically set forth in subparagraphs i, ii, iii, and iv of Paragraph 2, Part I of this petition for certiorari violates petitioners rights under the Fourteenth Amendment of the Constitution of the United States.

(b) Whether the constant flooding of inflammatory and false and prejudicial matter [evidence] into the great court of public opinion, with no right or opportunity to defend, as is specifically set out in sub-paragraph (i) of paragraph 3, Part I of this petition constitutes a violation of petitioner's right guaranteed him by the Sixth Amendment to the Constitution of the United States.

PART III.

REASONS RELIED UPON FOR THE SANCTION OF THIS PETITION.

Petitioner most respectfully contends that this Honorable Court ought to permit the filing of this petition and sanction the same and review the opinion and judgment complained of for these reasons:

(a) Because no claim of right urged by petitioner, accruing to him under the Federal Constitution, has at any time been noticed, or adjudicated by any court, the Supreme Court of Georgia having ignored the federal questions to deal merely with State court rules involving procedure in State courts, and thereby decided the questions, in effect, in a way probably not in accord with applicable decisions of this court;

(b) Because substantial federal questions are timely presented;

(c) Because the methods employed to bring about petitioner's conviction, as outlined in Part I of this petition, are outside any scheme of well ordered liberty and shock the conscience of justice;

(d) Because this petition for certiorari sets forth questions of deep public concern in that they involve questions affecting the administration of criminal jurisprudence in the several states under democratic processes which the people of the United States have laborously worked out under the Federal Constitution.

PART IV.

THE ASSIGNMENTS OF ERROR AND PORTIONS OF THE RECORD NECESSARY FOR CLEAR UNDERSTANDING.

Error is assigned on the making and entering of the judgment of the Supreme Court of Georgia, dated on the 15th

day of March, 1950, based upon an opinion of said court dated February 13th, 1950, and assigns error upon that opinion (R 98).

The following portions of the record in the case, duly certified to be true and correct by the Clerk of the Supreme Court of Georgia, under seal of that court, are filed concurrently with the filing of this petition, to-wit:

1. The petition for habeas corpus filed in Fulton Superior Court on the 16th day of September, 1949, together with filing entry, rule issued thereon and acknowledgment of service (R 1).

2. The response filed by A. B. Foster, Sheriff, Respondent, on the 24th day of September, 1949, less the exhibits, which are in nowise material to a clear understanding of the case (R 7).

3. The bill of exceptions filed in Fulton Superior Court by petitioner on the 17th day of October, 1949, together with the order of the court certifying the same as true and ordering the Clerk to transmit the case to the Supreme Court of Georgia, and the filing entry of the Clerk of the Supreme Court of Georgia showing the filing and docketing of the case in that court (the said bill of exceptions contains all of the evidence necessary to a clear understanding of the errors here complained of) (R 13).

4. The opinion of the Supreme Court of Georgia entered in the case on the 13th day of February, 1950, (R 89).

5. The motion for rehearing filed by this petitioner on the 22nd day of February, 1950, together with all amendments, and the certificate of service (R 94).

6. The order of the Court denying a rehearing in the case entered on the 15th day of March, 1950, (R 98).

7. The motion to stay the remittitur addressed to the Chief Justice Supreme Court of Georgia and the order thereon, dated March 16th, 1950, (R 98).

8. The order of the Chief Justice of the Supreme Court of Georgia staying the execution, (R 99).

Petitioner avers that the portions of the record catalogued above and transmitted constitute the entire record necessary to a clear understanding of the errors here complained of.

PART V.

PETITIONER'S PRAYER.

WHEREFORE, your petitioner prays that an order be now entered granting and sanctioning this petition for certiorari; that the certified transcript of proceedings of said court in the cause entitled upon its docket as John Wallace, Plaintiff in Error, vs. A. B. Foster, Defendant in Error, number 16924, transmitted herewith, be treated as though sent up in response to a formal writ; that said cause may be reviewed and determined by this court, and that petitioner have such other and further relief in the premises as this Honorable Court may deem appropriate.

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Petitioner's Counsel

BRIEF IN SUPPORT OF PLAINTIFF'S PETITION FOR CERTIORARI.

PART I

The Factual Basis

The factual basis will clearly appear from the record; the initial petition (R 1, et. seq.); the response (R 7, et seq.); the summary written by the Supreme Court of Georgia (R 91, et. seq.) and particularly subsection q of paragraph 12 of Respondent's answer (R 11), and the evidence adduced upon the trial (R 15, et. seq.).

PART II.

Brief of Authorities

This petitioner has invoked all of the corrective judicial process afforded by the State, inclusive of the pardoning and parole power. No further judicial remedy afforded by the state remains open. It affirmatively appears on the face of this record that a federal question constituting an appropriate ground for review here was presented in the State courts and was "expressly or necessarily" decided by the State court. This court has uniformly assumed jurisdiction in such cases. In *Whitney* vs. *California* this court referred to this rule as having been long settled, citing copious authority in support.

Whitney vs. *California*, 274 U. S. 357, 360.

See also:

Mooney vs. *Holohan*, 274 U. S. 103
People, etc. vs. *Zimmerman*, 278 U. S. 63
Davis vs. *Burke*, Sheriff, 179 U. S. 399
U. S. ex rel, etc. vs. *Kennedy, et al*, 269 U. S. 13.

Habeas Corpus initiated in the State court is an available remedy to persons imprisoned in violation of rights guaranteed by our Federal Constitution, and determinations there are reviewable by this court.

Pyle vs. *Kansas*, 317 U. S. 213.

The Pyle case, cited immediately above, closely parallals the case at bar.

The allegations in that case, as in this one, were that officers of the State (1) knowingly used perjured testimony and (2) deliberately suppressed testimony to obtain a conviction. This court said:

> "Habeas Corpus is a remedy available in the courts of Kansas to persons imprisoned in violation of rights guaranteed by the Constitution of the United States . . . they set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution . . ."
>
> *Pyle* vs. *Kansas*, Supra.

Federal Court will look to events infringing rights under Federal Constitution even though they do not appear upon the face of the record.

Federal Court will determine whether conviction occurred under such influence as will deny due process.

Where state does not provide corrective judicial process, federal courts will entertain habeas corpus to redress violation of federal constitutional right in criminal proceedings in State courts.

When the corrective process is provided by the State but error, in relation to the federal question of constitutional violation creeps into the record, the federal courts have the responsibility to review the proceedings.

More than a "bare legal review" of authority under which a prisoner is held was enjoined upon federal courts by an Act of Congress of 1867.

Hawk vs. *Olson*, 326 U. S. 271.

No adjudication in a State court involving a federal question becomes res judicata, to rob federal courts of jurisdiction.

Federal court may entertain petition for habeas corpus and determine merits of constitutional claim, though defendant had not availed himself of the remedy of appeal.

Wade vs. *Mayo*, 334 U. S. 672.

The news services, inclusive of editorial writers, feature writers and radio commentators went far beyond objective reporting. Some of these were directed specifically at constitutional agencies of the State government and were timed to cover the State on the very day previous to hearings had in the case. They were quite as effective as a show of violence.

A thesis by Judge Samuel H. Sibley, of the Fifth Circuit Court of Appeals, entitled "The Informal Law," is probably the greatest legal-philosophical literature illustrating plaintiff's contention that the decrees of the informal courts —the great court of public opinion—are effective far above the decrees of the formal courts.

Georgia Bar Ass'n Reports, 1919.

Mr. Justice Frankfurter wrote a learned opinion in *State* vs. *Baltimore*, etc. discussing and quoting interesting cases by this and English courts which will illustrate the helpless state of this petitioner to protect himself against this avalanche of prejudicial publicity which weighed so heavily against him. The Justice quotes Lord Hardwiche in the case of the St. James Evening Post (in 1742), in which that great English jurist dealt with publicity "prejudicing mankind against persons before their case is heard".

State vs. *Baltimore Radio Show, Inc.*, 705 S. Ct. 252.

Mr. Justice Reed, after exhaustive research, and in the

recent case of *Darr* vs. *Burford*, treated every question here presented. The majority opinion in that case quieted the troublesome question of comity which disturbed the Justices who wrote the dissenting opinion, namely: the power of federal courts to entertain applications for a writ of habeas corpus on behalf of state prisoners.

We have carefully checked the prerequisites outlined by this court in that case to taking jurisdiction in the character of cases here presented. Every prerequisite has been met; we raised each question here presented in the court of first instance; we attack only the sentence being imposed; we did not bring this case to the federal judiciary until "courts of another sovereignty with concurrent powers, and already cognizant of the litigation" had opportunity to pass upon the question presented; we exhausted every remedy available in the courts of the state.

Darr v. *Burford*, 70 S. Ct. 587.

Reference to the opinion of the Supreme Court of Georgia (R 89) will clearly convince this Court that substantial federal questions were presented but never passed upon, but buried in legalistic requirements (technical rules of procedure in the state courts) at irreconcilable conflict with the rule announced in the fourth headnote of *Darr* v. *Burford*, supra.

In numerous cases this court has held that where the rights invaded by prosecuting officers of a State are basic and fundamental the due process clause of the Fourteenth Amendment includes by implication those guaranteed by the Bill of Rights.

Frank vs. *Manghum*, Sheriff, 237 U. S. 309.

(Dissenting opinion of Justices Hughes & Holmes).

See also:

Saia vs. *New York*, 334 U. S. 558
Cantwell vs. *Conn*, 310 U. S. 296

Marsh vs. *Alabama*, 326 U. S. 501
Lovell vs. *Griffin*, 303 U. S. 444
Francis vs. *Resweber*, 329 U. S. 459.

Respectfully submitted,

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